



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Jewett-Cameron Lumber Corp.; Kennedy-Johnsen
Lumber, Inc.; Broadview Lumber Co.; Rolando
Lumber Co., Inc.

File: B-229582; B-229582.2; B-229582.6; B-229582.7

Date: March 15, 1988

DIGEST

1. Protesters who object in general to the use of a particular contract format have not met their burden of showing that agency's decision to use requirements contracting format to satisfy its needs was clearly unreasonable.
2. General Accounting Office has no basis upon which to object to agency's decision to use requirements contracting when solicitation estimates are established in good faith based on the best information available, notwithstanding protesters' general objections to the estimates.
3. Agency did not abuse its discretion by using solicitation terms which imposed maximum risks upon the contractor and minimum administrative burdens upon the government where solicitation format calls for fixed freight prices within a geographic zone even though specific destinations and quantities are not known.
4. Basing contract prices on a weekly trade price index is appropriate where offerors are treated equally and cannot influence the index prices.
5. Requirements contracts are exempt from regulations requiring small business/small purchase set-asides.
6. Recommendations contained in an earlier General Accounting Office audit report concerning the agency's use of local requirements contracts are not relevant because the subject matter of the report is not analogous to the protested procurement.

041584/135308

DECISION

Jewett-Cameron Lumber Corp., Kennedy-Johnsen Lumber, Inc., Broadview Lumber Co., and Rolando Lumber Co., Inc., protest request for proposals (RFP) No. DLA720-88-R-0001, issued by the Defense Construction Supply Center (DCSC), for annual requirements contracts to satisfy the needs of the Department of Defense (DOD) for a group of 5 fire retardant treated plywood items and a group of 26 untreated plywood items. The protesters' basic contention is that DCSC's decision to meet its plywood needs through the use of requirements contracts is improper. We deny the protests.

THE RFP

The RFP was issued on an unrestricted basis on October 13, 1987. It was amended six times, largely in response to concerns expressed by the protesters and other potential offerors. The amended closing date for receipt of proposals was January 14, 1988. DCSC reports that a number of offers are currently being evaluated and advises that awards will be withheld pending its review of our decisions in the protests before this Office.

Basically, the RFP contemplates the award of up to two annual requirements contracts for plywood (one for plywood treated with fire retardant; another for untreated plywood) in each of five designated geographic zones. For domestic plywood requirements, each contract will contain two charges for f.o.b. destination delivery to any point within a zone (one price for delivery orders equalling or exceeding truck-load quantities; another for smaller amounts); where applicable, overseas plywood requirements are to be delivered f.o.b. destination to a designated port-of-loading within one of the geographic zones. Delivery orders for DOD plywood requirements in excess of 10 sheets must be placed under the requirements contracts.

Contract pricing and price evaluation for award purposes consist of two components for each plywood item. The first component, denominated the "base price", is variable and is predicated upon prices listed weekly in a trade publication called Random Lengths Lumber and Plywood Market Reporting Service. The second component, which forms the basis for competition in the procurement, is comprised of three fixed-price "factors" to be offered for each item: (1) a "freight factor" representing the amount to be charged for transportation for large and small quantities; (2) an "exception factor" representing the amount to be charged for designated optional services which may be ordered under the contract,

and (3) a "special factor" representing any increase (or decrease) in item price that an offeror chooses to submit.

Evaluation for award purposes is made by adding the base price and offered factors and then multiplying the total by an estimated contract quantity to achieve an extended item price. The extended item prices are totaled to arrive at a comparative overall price for each award group in a geographic zone. The RFP provides estimated quantities for each item within a zone; domestic and overseas estimates are separately stated.

The use of requirements contracting represents a change in the manner DCSC has employed to satisfy DOD plywood needs. In the recent past, requirements for particular locations were purchased through numerous definite quantity contracts on an "as needed" basis. The protesters insist that this prior method has resulted in reasonable prices to the government. On the other hand, DCSC maintains that centralized purchasing, as contemplated by the RFP, will prove cost-effective to the government because it will eliminate many time consuming and costly individual procurements.

PROTEST ISSUES

The protesters object to the use of this format on four principal grounds: indefiniteness of the RFP; the propriety of using Random Lengths to compute base prices; failure to set the procurement aside for small businesses or labor surplus area (LSA) concerns; and the need to consider earlier recommendations of our Office concerning the procurement of plywood.1/

1/ Some of the issues initially raised concerning various RFP provisions have been the subject of subsequent RFP amendments and, since no new objections have been raised concerning these points, we consider them moot. Joseph Carter, B-227094, June 17, 1987, 87-1 CPD ¶ 608. These issues consist of complaints concerning the RFP formula for pricing delivery orders, separate award groups for treated plywood items, overstated estimates for some grades of plywood, and the length of the contract option period. Similarly, some issues raised initially concerning the definition of truckload quantities, special responsibility standards, contract termination and rail delivery were responded to by the agency in its reports but, were not the subject of further comment by the protesters. We consider these issues abandoned. Consolidated Devices, Inc.--Reconsideration, B-225602.2, Apr. 24, 1987, 87-1 CPD ¶ 437.

Contract Format in General

The contracting agency has the primary responsibility for determining its minimum needs and the method of accommodating them, and this principle applies to the contracting format used to purchase items which it needs. Mills Mfg. Corp., B-224004 et al., Dec. 18, 1986, 86-2 CPD ¶ 679. We will not upset the contracting agency's determination in this respect absent clear evidence that its decision is arbitrary or unreasonable. Id. We will thus uphold an agency's rationally based decision to procure the items it needs using, for example, large quantity requirements contracts as opposed to smaller definite quantity contracts unless a protester is able to show that the agency's choice of contract format is clearly unreasonable. See King's Point Mfg. Co., Inc., B-220224, Dec. 17, 1985, 85-2 CPD ¶ 680. A mere difference of opinion between the protester and the agency concerning which format will best suit the agency's needs is not sufficient to upset the agency's decision. Id. Here, for the reasons set forth below, the protesters have not clearly shown that the agency has exercised its judgment unreasonably in choosing its contracting format. Consequently, we have no legal basis upon which to interfere with the agency's solicitation.

Indefiniteness

The protesters contend that the RFP contains too many "unknowns" to justify the use of requirements contracts and to enable the preparation of intelligent and accurate offers. As one protester, Broadview, alleges: "[t]here is no method to calculate a delivered cost for movement of an undetermined amount of plywood to an unspecified destination." Moreover, the protesters argue that the risks presented to contractors by being locked into fixed transportation prices for domestic requirements within a zone for all orders irrespective of quantity or destination will necessarily result in excessively expensive pricing strategies.

DCSC responds by stating that the RFP contains good faith quantity estimates based on reliable historical data for each item solicited. Moreover, the agency references the detailed update of estimated quantities contained in amendment No. 0005, and notes further that amendment No. 0005 also provided data concerning the amount of plywood previously delivered to various destinations within each zone. Recognizing that some risk is still involved in developing shipping prices, DCSC maintains that imposition of a degree of risk does not make an RFP improper. The agency states further that the new format will, in its judgment, lower the overall cost of fulfilling DOD's plywood

needs by eliminating the expenses required in conducting numerous local-level fixed quantity procurements and by reducing the time needed to conduct such procurements.

The use of requirements contracting is authorized by Federal Acquisition Regulation (FAR) § 16.503(b), which states that such contracts may be used when an agency anticipates recurring requirements but cannot predetermine the precise quantity of supplies that are needed during a definite period. As indicated earlier, the agency has the discretion to make a reasonable choice as to the contract format best suited to its particular needs. Mills Mfg. Corp., B-224004 et al., supra.

Here, while the protesters contend that the format may well increase their risks of doing business, they have not demonstrated that DCSC's decision to use requirements contracting in the manner contemplated by the RFP was clearly unreasonable or that it violated FAR § 16.503(b). In this regard, we point out that amendment No. 0005 represented a rather extensive effort by the agency to provide offerors with current and detailed ordering information in an attempt to minimize the risks inherent in developing shipping prices for domestic delivery orders of different sizes to any point within a zone. Further, we note that the extensive RFP breakdown of estimates between domestic and overseas requirements and provisions distinguishing between small and large order pricing represent good faith efforts in balancing risks between offerors and the government. Moreover, the use of requirements contracting is appropriate if the estimates used in the solicitation are established in good faith and are based on the best information available. Sentinel Electronics, Inc., B-221914.2 et al., Aug. 7, 1986, 86-2 CPD ¶ 166. Here, while the protesters object in general to the estimates, they do not argue that the estimates were developed as the result of bad faith, nor do the protesters maintain that they were based on faulty data. Consequently, the protesters provide us with no legal basis upon which to object to the solicitation based on the estimates used.

Further, the protesters complain about the risks of offering on such a solicitation. It is within the ambit of an agency's administrative discretion to solicit a proposed contract imposing maximum risks upon the contractor and minimum administrative burdens upon the government. Duroyd Mfg. Co., B-213046, Dec. 27, 1983, 84-1 CPD ¶ 28. The fact

that the solicitation may impose risk on the offerors does not make it improper. Richard M. Walsh Associates, Inc., B-216730, May 31, 1985, 85-1 CPD ¶ 621.

Random Lengths

The protesters criticize the use of the weekly issues of Random Lengths to establish base prices, essentially arguing that it might not insure that the government would always obtain the best possible prices for the plywood it needed.

DCSC states that using Random Lengths helps to protect the government and the contractor against the admittedly volatile plywood price market. Recognizing that the base price obtained by reference to the index in Random Lengths may not always reflect the best price for a designated quantity at a given time, DCSC asserts that it reflects a "reasonable and generally obtainable price." Also, implicit in the agency's position is the assumption that administrative cost savings to be achieved through centralized annual contracting will outweigh any increased costs which might attend a given delivery order priced on the basis of Random Lengths. We do not in general object to using published industry price indexes as a factor in establishing contract prices so long as all offerors are treated equally through their use and the actions of a contractor cannot influence the index prices. See in general The Owl Corp., B-224174, Dec. 23, 1986, 86-2 CPD ¶ 706; Hampton Metropolitan Oil Co., et al., B-186030 et al., Dec. 9, 1976, 76-2 CPD ¶ 471. We see no reason to object to the agency's use of Random Lengths as a base for the order prices under contracts awarded pursuant to this solicitation.

Set-Asides

The protesters contend that the multi-regional approach of requirements contracting will have an adverse effect on competition, particularly with respect to the small business community. They note that small businesses have played a significant role in the past in supplying DOD with plywood, even though the prior procurements were admittedly conducted on an unrestricted basis. The protesters also argue that the RFP, or a portion thereof, should be set aside for small businesses or for LSA concerns.

As a general rule, the decision whether to set aside a particular procurement for small business is within the discretion of the contracting officer. T-L-C Systems, B-225496, Mar. 27, 1987, 87-1 CPD ¶ 354. There are two situations in which an agency is required to set aside a specific procurement. One is where a contract has an anticipated value of \$25,000 or less and is subject to small

purchase procedures. FAR § 19.501(f). The other is pursuant to FAR § 19.501(g) where an item has previously been acquired successfully by a contracting office on the basis of a small business set-aside--which is not the case here.

Because it contemplates requirements contracts against which delivery orders will be placed, this procurement is specifically exempt from small purchase procedures, FAR § 13.101(a), and, therefore, it is not subject to the requirement in FAR § 19.501(f) that procurements conducted under these procedures be set aside for small business. In cases such as this, the decision to set aside the procurement is based on whether there is a reasonable expectation of receiving sufficient competition from small business, FAR § 19.502-2, or from LSA concerns, FAR § 20.201-1, so as to insure that awards are made at reasonable prices. That determination basically involves a business decision within the discretion of contracting officials, and our review is limited to ascertaining whether those officials have abused that discretion. See T-L-C Systems, B-225496, *supra* (small business); and Par-Metal Products, Inc., B-190016, Sept. 26, 1977, 77-2 CPD ¶ 227 (LSA concerns).

One protester, Jewett-Cameron, has submitted evidence with respect to the small business set-aside issue. That evidence consists of a month-by-month summarization of DOD award data for plywood for a 1-year period ending October 1987, broken down into dollar amounts awarded to large and small business, and dollar amounts of items provided by large and small lumber mills under those awards. While the summary does disclose some degree of participation by small business contractors and an apparent use of small business subcontracting by some large business contractors, it does not specify whether the plywood items purchased are the same as those now solicited. No evidence has been presented with respect to the LSA issue. The fact there has in the past been some small business participation in procurements for this type of item does not mean that the agency's judgment regarding the degree of competition to be expected on a requirements-type RFP for the plywood items in question, and the subsequent decision to issue that RFP on an unrestricted basis, was unreasonable.

Audit Report

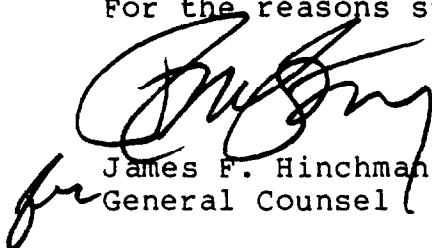
The protesters refer to an audit report issued by our Office in 1975 concerning DCSC's use of certain requirements contracts for wood products as evidence that the solicitation is improper. See PSAD-75-49, Jan. 27, 1975. That report was critical of the agency's requirements contracts

used at the time, and the protesters allege that the concerns then expressed by our Office are applicable to the protested solicitation.

The cited study concerned requirements contracts for lumber for some 200 military installations which were designed to supplement local retail purchase authority then in existence. Specifically, our report criticized the validity of estimates used in the requirements contracts studied, and the agency's failure to observe daily purchase limitations under those contracts. Moreover, the cost-effectiveness of using requirements contracts of the type studied was questioned in light of the relatively small volume of the agency's lumber needs at that time and the volatility of the lumber market.

DCSC states that under the RFP virtually all of DOD's needs will be met under the various contracts awarded under the RFP, thus eliminating the distinction between centralized and local purchasing that existed at the time of the audit report. The agency also points out that there is no valid relationship between the problems encountered in its program during the early 1970's, which involved numerous small requirements contracts each administered at the local level, and the current solicitation which contemplates a few large requirements contracts, each of which will serve many local DOD activities. DCSC also states that it now has reliable historical supply data upon which to base contract estimates. Moreover, DCSC says that the proposed use of Random Lengths market prices on a weekly basis corrects problems regarding price volatility which were addressed in the 1975 report. Thus, DCSC reasons that these previous findings are not applicable to the present procurement. We do not think that the results of a study conducted with regard to a much different program over 10 years ago provide sufficient grounds for us to object to the legality of the current solicitation.

For the reasons stated above, the protests are denied.


James F. Hinchman
General Counsel